

FALCONBRIDGE, C.J.K.B.

AUGUST 30TH, 1918.

SANDWICH WINDSOR AND AMHERSTBURG RAILWAY
v. CITY OF WINDSOR.

*Company—Limited Powers—Electric Street Railway Company—
Sale or Lease of Surplus Electricity—56 Vict. ch. 97, sec. 9—
Right to Place Poles and Wires on Highway—Evidence—Judg-
ment of Appellate Court—Effect of.*

Action for an injunction to restrain the defendants from interfering with the plaintiffs in the erection of extensions, and for damages.

See the note of the judgment of a Divisional Court of the Appellate Division, Sandwich Windsor and Amherstburg Railway v. City of Windsor (1917), 13 O.W.N. 336.

The further trial of the action took place at Sandwich.

A. W. Anglin, K.C., and A. R. Bartlet, for the plaintiffs.

E. D. Armour, K.C., and F. D. Davis, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the uncontradicted evidence of the assistant general manager of the Detroit United Railways supplied the information called for by the Divisional Court on the following points, viz., to what extent and in what circumstances surplus electricity beyond that required for the purposes mentioned in 56 Vict. ch. 97, sec. 9, was produced, also as to the nature and extent of the operations of the plaintiffs in selling or leasing their surplus power.

If the matter had been *res integra*, the learned Chief Justice would have been of opinion that the plaintiffs had the right to erect the poles and have their wires on the highway or lane, and that the question of the limits of the use to which the poles might be put was not in issue here.

But, in view of the strong expressions of opinion in the early part of the judgment of the Divisional Court (which he was not at liberty to regard as mere *obiter dicta*), he must hold that the action failed.

Both parties should have leave to amend the pleadings as they might be advised.

Action dismissed with costs.